

Our ethical responsibility to help ourselves and our colleagues

The recently released ABA/Hazelden survey¹ and the new data on law students² serve as a stark reminder of the challenges we face as a profession. Both studies confirm what we have known all along: Lawyers and law students suffer from chemical and mental illness at significantly higher rates than the rest of the population.³ What these new studies add is that new lawyers are at greater risk than once believed, and that both lawyers and law students are reluctant to get the help they need.⁴ Ensuring that lawyers who are ill get the help they need is not just a good thing to do—it is the ethical thing to do.⁵

As lawyers, we are officers of the legal system and have a special responsibility for the quality of justice. As public citizens, we should seek improvement not only of the law, but the quality of service rendered by the legal profession; work to strengthen legal education; and help the bar regulate itself in the public interest. Each of us, guided by personal conscience, should strive to improve the legal profession. The future of each of these pillars of our profession depends on how we acknowledge and address chemical and mental illness.

Addressing our chemical and mental health as lawyers is also our professional responsibility. Most obviously, an untreated illness has the potential to affect competence. Competent representation of clients requires knowledge, skill, thoroughness and the preparation necessary for the representation.⁶ Consequently, the Minnesota Rules of Professional Conduct (MRPC) prevent a lawyer from representing a client when the lawyer's physical or mental condition materially impairs his or her ability to represent the client,⁷ and require a lawyer who knows of a lawyer's violation of the Rules that raises a substantial question of their fitness as a lawyer to inform the appropriate professional authority.⁸

A lawyer's obligations when he or she is aware of a lawyer—within or outside his or her firm—who suffers from a disability or impairment is the subject of two separate American Bar Association opinions.⁹ Notably, the MRPC *do not* require

disclosure by lawyers or judges who are participating in a lawyer assistance program that provides assistance, support, or counseling to lawyers who are chemically dependent or have mental disorders.¹⁰

Minnesota's bar admission and disciplinary systems encourage law students and lawyers to get help:

Bar admission. Minnesota's Board of Law Examiners (MBLE) encourages applicants to get the help they need and indicates that it looks favorably upon those who seek help.¹¹ The questions focus on a bar applicant's conduct and conditions that currently impair or would have impaired an applicant's ability to meet the essential eligibility requirements within the last two years.¹² If an applicant has engaged in conduct of concern¹³ or has been impaired as the result of a chemical or mental illness, the MBLE focuses on rehabilitation.¹⁴ An applicant whose rehabilitation is recent yet who otherwise meets the character and fitness requirements can be conditionally admitted. Conditional admission allows the applicant to be admitted with a safety net to ensure continued rehabilitation.¹⁵ A lawyer's conditional admission status is not public. Consequently, law students have every incentive to get the help they need without fear of a negative consequence for seeking treatment.

Discipline. In addition to MRPC 8.3(c), which removes the fear of being reported to disciplinary authorities by virtue of seeking help, the disciplinary system recognizes rehabilitation. As detailed most recently by the former director of the Office of Lawyers Professional Responsibility, disciplinary probation often provides a road to rehabilitation, saving the career of a lawyer with chemical or mental illness who has engaged in isolated or non-serious misconduct.¹⁶ For lawyers who have engaged in serious misconduct and can prove a chemical or mental condition caused their misconduct, the disciplinary sanction may be mitigated.¹⁷ Minnesota's disbarment cases provide the greatest incentive to effectively treat mental and chemical

health concerns to avoid serious misconduct in the first place.¹⁸

Preventing malpractice or risk of discipline. Supporting rehabilitation and recovery from a chemical or mental illness is a good risk management practice. Lawyers in recovery have been shown to have lower malpractice and discipline complaint rates than the general population of lawyers.¹⁹ But the OLPR's annual reports consistently show that 20 to 30 percent of new probations each year have a psychological or chemical dependency component.²⁰ Most transfers of lawyers to disability inactive status involve a very serious mental illness or chemical dependency component.²¹

Lawyer assistance. The Minnesota Supreme Court and the lawyers of Minnesota ensure that the members of our profession have chemical and mental health assistance through Minnesota's lawyer assistance program, Lawyers Concerned for Lawyers (LCL). Supported by lawyer registration fees and charitable donations, LCL provides free, confidential help to all lawyers, judges, and law students on substance use, compulsive behaviors, mental health, financial, career and other concerns that cause stress or distress. It offers online resources, peer support, professional counseling and more.

Why would a lawyer or law student avoid getting the professional help they need?

Competition. The legal profession's culture tends to discourage open dialogue about how we feel and what we believe. Asking a lawyer how they are doing is likely to elicit references to clients, employment, and external indicators of success rather than an assessment of how things are actually going. This is cultivated in law school, where smart, high-achieving students find themselves in an environment where they compete for grades, resume-building activities, and employment. It thrives in environments where lawyers are rewarded for what they produce and discouraged from exposing weakness to adversaries or colleagues.

Professional Responsibility

Stigma and shame. Though both chemical and mental illness have a physiological source, the legal profession, like the broader culture, stigmatizes those who suffer from them. There is a mistaken belief in the profession that an illness with a chemical or mental component is a weakness. Shame is frequently associated with chemical abuse. At a minimum, there is uncertainty as to how they will be viewed by their colleagues.

Culture of overwork. As law students and lawyers, we wear our dysfunction as a badge. It is not uncommon to hear law students plan Thursday night bar review or drinks after an exam. The legal profession focuses its events and professional activities around alcohol, and we openly acknowledge our use of alcohol to address stress. We are proud of our billable hours, working around the clock, getting by on little or no sleep, and how we stay connected to our work while we are on vacation.

Fear. Lawyers and law students fear repercussions from colleagues, employers, bar examiners, and disciplinary authorities. Law students fear if they seek help, they will not be admitted to the bar.²² Lawyers fear they may be disciplined. These fears are not totally irrational given the importance of being admitted and staying admitted to the bar. Yet the fear often results from misinformation or lack of information. Some lawyers are afraid to ask for help from LCL because they mistakenly believe they will be reported to the OLPR. That simply does not and will not happen.

Here's what each of us can do:

Take a look at ourselves. Each of us should consider how we are addressing stress in our environment. How do you feel? Are you using healthy coping mechanisms like meditation, exercise, and human connection, or unhealthy ones like alcohol?

Set good examples in our workplaces and professional activities. If you have a voice in the planning of a reception, retreat, or other activity, look at the role of alcohol in the event. Each time we center our activities on alcohol, we send the message to law students and our colleagues that alcohol is how we relax and address our stress.

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Support your colleagues. Take an interest in the health of your colleagues. Mentor law students, new lawyers, and not-so-new lawyers on how to take care of themselves. Learn to recognize problems, express concern, and help lawyers. Tell your story, show vulnerability, or share information and offer support. Host or attend CLE programs to educate yourself and others on chemical and mental health. If you are concerned about a colleague, LCL can coach you on how to help.

Support a culture of acceptance and humanity. Encourage discussion of the negative impact that law study and law practice have on us as human beings. Help dispel the fiction of chemical and mental health concerns as indicative of character, professionalism, or strength. Support each other.

Get help. Use the resources available through LCL²³ to get help for yourself and others. It could save a life. ▲

Notes

¹ ABA's CoLAP Café Blog has links to the ABA's press release, the ABA/Hazelden study, and links to other sources: <https://abacolap.wordpress.com/2016/02/08/new-study-from-aba-and-hazelden-released-gets-widespread-coverage/>

² See Jerome M. Organ, David B. Jaffe, and Katherine M. Bender, "Helping Law Students Get the Help They Need: An Analysis of Data Regarding Law Students' Reluctance to Seek Help and Policy Recommendations for a Variety of Stakeholders" 84 *Bar Examiner* 4 (Dec. 2015) at <http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia%2Ffiles%2FBar-Examiner%2Fissues%2FBEDec2015-Abridged.pdf>

³ See Andrew H. Benjamin et al. "The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers," 13 *Int'l J. of Law & Psych.* 233, 240-41 (1990) (18% problem drinkers vs. 10% in overall population; 19% of lawyers depressed vs. 3-9% in overall population). *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 *J. Legal Educ.* 1, 35-80 (March 1994) (Law students had high risk of chemical dependency and 3.3% believed they needed help to control drug or alcohol use).

⁴ Findings of the recent lawyer study indicate that more than 20% of lawyers met criteria for substance use disorder

and the rates of depression and anxiety were 29% and 19% respectively. Patrick Krill, Ryan Johnson, Linda Albert "The Prevalence of Substance Use and Other Mental Health concerns among American Attorneys" 10 *Journal of Addiction Medicine* 1, pp. 46-52 (Feb. 2016). Findings of the recent law student study indicate that 43% of the students reported binge drinking at least once in the past two weeks, 22% twice or more times during that period; 17% screened positive for depression; 23% for mild to moderate anxiety, and 14% for severe anxiety.

⁵ As used here, "ethical" refers to a moral, aspirational philosophy rather than a reference to the Rules of Professional Conduct, which are minimum standards of conduct.

⁶ Minnesota Rules of Professional Conduct, Rule 1.1.

⁷ *Id.*, Rule 1.16(a)(2).

⁸ *Id.* Rule 8.3(a). See ABA Formal Opinions 03-429 (Obligations with respect to mentally impaired lawyer in the firm) and 04-431 (Lawyer's duty to report rule violations by another lawyer who may suffer from disability or impairment).

⁹ See ABA Formal Opinions 03-429 (Obligations with respect to mentally impaired lawyer in the firm) and 04-431 (Lawyer's duty to report rule violations by another lawyer who may suffer from disability or impairment). In Opinion 03-429 the ABA posits that if a lawyer's mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable assurance that such impairment will not result in breaches of the Rules of Professional Conduct. In Opinion 03-431, the ABA states that a lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to represent clients, must report that lawyer's consequent violation of Rule 1.16(a)(2).

¹⁰ *Id.* Rule 8.3(c).

¹¹ Minnesota's bar application asks a series of questions about chemical dependency and mental health, prefaced with the note "The Board asks these questions because of its responsibility to protect the public by determining the current fitness of an applicant to practice law. . . . The Board strongly encourages applicants who have mental health and chemical dependency issues to seek treatment. The Board

views mental health and chemical dependency treatment as a positive factor in evaluating an application." See page 7 of the Application for Admission, available at [http://www.ble.state.mn.us/file/Bar%20Application%202014%20-%20fill%20in\(6\).pdf](http://www.ble.state.mn.us/file/Bar%20Application%202014%20-%20fill%20in(6).pdf) The questions do not ask about whether an applicant has sought chemical dependency treatment or mental health counseling.

¹² *Id.* at 4.37. The essential eligibility requirements are in Rule 5A of the Rules for Admission to the Bar, available on the BLE's website: www.ble.state.mn.us/rules

¹³ See Rule 5B(3) of the Rules for Admission to the Bar for the conduct that the BLE treats as cause for further inquiry.

¹⁴ See Rule 5B(4)(5); preamble on p. 4 of the Application for Admission.

¹⁵ See Rule 16 of the Rules for Admission to the Bar.

¹⁶ Marty Cole, "Private Probation: Saving a Career?" LXXII *Bench & Bar of Minnesota IX*, 14-15 (Oct. 2015).

¹⁷ *In re Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983) (psychological problem); *In re Johnson*, 322 N.W.2d 616, 618 (Minn. 1982) (alcoholism).

¹⁸ See *In re Mayne*, 783 N.W.2d 153 (Minn. 2010); *In re Rodriguez*, 783 N.W.2d 170 (Minn. 2010); See also J. Rush, "Disbarment of Impaired Lawyers: Making the Sanction fit the Crime" 37 *William Mitchell L. Rev.* 2, 916 (2011).

¹⁹ Ira Zarov and Barbara S. Fishleder, "New Study Shows Recovery Saves Dollars" 5 *ABA Highlights* 2 (April 2002) available at http://www.americanbar.org/content/dam/aba/publishing/highlights_newsletter/legal_services_colap_highlights_spring02.authcheckdam.pdf (Lawyers had four times more malpractice and disciplinary complaints before recovery than after recovery.)

²⁰ 2013, 2014, 2015 Annual Reports of the OLPR/LPRB available at www.lprb.mncourts.gov. (The number of new probations and those attributable to chemical dependency and psychological concerns are reported in the "Probation" section of each report.)

²¹ Rule 28 of the Minnesota Rules on Lawyers Professional Responsibility governs the transfer to disability inactive status.

²² Potential threat to bar admission was the #1 factor discouraging students from getting help. Organ et al. study supra n. 2 at 10.

²³ Contact LCL at (651) 646-5590. For more information visit LCL's website: www.mnlcl.org